1942

File No. O Town Plan 42

Legal **DEPARTMENT**
"A" **BRANCH**

Subject:—

Opinions under the Bombay Town Planning Act 1915

D-19

File No. O Town Planning/42

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256-A

C O N T E N T S.

Legal Department file No. 0. Town Planning/42.

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3)	O. No. 2442/19/3/42.	Secs. 26,28 and 40. Whether the holder of a final plot or plots who is liable to pay incremental contributions under the Town Planning Scheme but has not so far paid, is liable to pay interest on contributions, if he— a) Now pays the whole sum in one instalment directly; b) pays the whole sum due an individual plots in one instalment after undertaking to pay it in instalments; or c) pays partly in instalments and the balance in one instalment without undertaking to pay in instalments.	9-10.
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Mukhav Rachudan.

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6/5.

Submitted.

PP. 9-10 of File Slipped F.

The facts as stated by the Dy. Asstt. Consulting Surveyor to Govt. in his letter No. T.P.Ban. III/152/50 dated 24-4 1941 are as follows:-

S.No. 115, Hissa No. 4(Original Plot No. 678) was from the commencement shown in the name of Mr. Anthony Salvador D'Abreo in the draft scheme prepared by the Bandra Municipality. Later on it was noticed by the Land Manager on verification with the record of rights that the property stood in the name of Mrs. Isabel. It, however, seems that that the necessary alteration was not made by the Arbitrator while drawing up the ~~draft~~ final scheme, the result being that in the T.P.Scheme Bandra III as finally sanctioned by Govt. on 2-11-1940. The Final Plot No. 602 (Original Plot No. 678) has been shown as belonging to Mr. Anthony Francis Salvadore D'Abreo(vide Serial No. 152 at p.36 of the Scheme) It will however, be clear that Mr. D'Abreo has been shown as owner of Original Plot No. 678 (Final Plot No. 602) whereas in reality he is the owner of Original Plot No. 684.

Vide p. 29 of File Slipped F.

pp. 1-3 of File Slipped F

2 On 20-2-1941, Mrs. Asabel w/o Minguel Francis D'Silva applied to the Arbitrator to the necessary correction in the Scheme. At this, Mr. D'Abreo was called upon by the Dy. Asstt. Consulting Surveyor to produce proof of his ownership of S.No. 115, Hissa No. 4. It appears that Mr. D'Abreo appeared before the Dy. Asstt. Consulting Surveyor on 3-6-1941 and alleged that he did not claim the whole of S.No. 115, Hissa No. 4 but that about 100 Sq. yds. out of the said S.No. belonged to him. He however agreed to surrender that portion of land infavour of Mr. Isabel on payment of Rs. 100 for 100 sq.yds.

ide p.17 Do

p. 23 Do.

ee pp. 29-30 of File Slipped F

3 It is clear that in the Record of Rights S.No. 115 Hissa No. 4 (Original Plot No. 678 and Final Plot No. 602) stood in the name of Mrs. Isable widow of Minguel Francis D'Silva (vide Mamlatdar's letter date 8-6-41). p.47 Do.

4 The question for the B.L.A.'s consideration is whether the error committed by the Consulting Surveyors Deptt. can be rectified by having recourse to section 45B of the Bombay Town Planning Act, 1915. (see also p.29 Do) Vide p.29 ante

5 Sec. 4(1) of the Bombay Town Planning Act, 1915 provides for an enquiry in a disputed claim as to ownership of any land when the entry in the record of rights or Mutation register is inaccurate or inconclusive. It does not appear that there was an dispute in the present case as regards claim of ownership as contemplated by sec. 4(1) From the Dy. Asstt. Consulting Surveyor's letter dated 24-4-41 and the subsequent inquiry. It is clear that in the Record of Rights Original Plot No. 678 is entered in the name of Mr. Isabel and that Mr. D'Abreo is in fact owner of Original plot No. 684. It was through inadvertence that Original Plot No. 678 was shown in the name of Mr. D'Abreo. There is nothing in the papers to show that except the bare statement of his claim to about 100 sq. yds. of Original Plot No. 678. Mr. D'Abreo produced any documentary evidence in support of his claim before the Dy. Asstt. Consulting Surveyor. pp. 9-10 Do pp. 29-30 Do.

6 Sec. 45B(1) of the Bombay Town Planning Act, 1915 as amended by Bom. Act XXI of 1938 provides that if after the final scheme has come into force, the local authority considers that the scheme is defective on account of an error irregularity or informality , the local authority may apply to the Provincial Govt. for the variation of the scheme. Under sec. 45B(2), if on receiving such application or otherwise the provl.Govt. is satisfied that the variation required is not substantial, the Provl. Govt. shall publish a draft of such variation in the prescribed manner. It is clear from the papers that the name of Mr. D'Abreo as owner of Original Plot No. 678 (Final Plot No. 602) was entered through mistakes . There is nothing to show that so

far as Original Plot No. 678 is concerned the ownership of it was transferred from Mrs. Isabel to Mr. D'Abreo (vide sec. 12(2)(d) , It is a case relating to rectification of defect on the ground of error and it appears competent to the local authority to move Govt. for variation of the scheme under sec. 45B(1) and as the variation does not appear to be substantial Govt. may publish the draft variation under sec 45B(2) of the Act.

Sd./ S.P.Bhangara 24/1
SAS.

Since the final scheme has already been sanctioned by Government in the present case Mr. Anthony Salvadore D'Abreo who has been shown as the owner of the final plot No. 602 in the final scheme, is entitled to retain possession of it or if not already in possession of it to be put in possession of it under sec. 42 of the Bombay Town Planning Act, 1915 It may be that Mrs. Isabel is the real owner of the Plot; but she did not take any objection when the draft scheme, showing Mr. Anthony Salvadore D'Abreo as owner thereof, as published under sec. 30(1) nor did she dispute his alleged ownership of the land under section 4(1) at any stage before the final scheme was drawn up under sec 30(10) Consequently the rights in the plot are determined under sec. 41(b) The change of the entry of the plot in favour of Mrs. Isabel would involve adjudiction of proprietory rights therein and would therefore be a substantial variation of the Scheme and consequenlty no act on under sec. 45B would be legally feasible . It should therefore be left to the parties to litigate their rights in a Court of Law and if a decree is obtained by Mrs. Isabel declaring her to be the owner of the

plot or Mr. Anthony consented to her ownership there would then be no objection to changing the entry accordingly in the Final Scheme under Sec.4(3).

Sec. 4(3) will not apply if action under sec. 4(1) was not taken at the proper time.

R.T.E. 20/1

D.S.

Under sections 41 and 42 of the Bombay Town Planning Act 1915, the reconstituted plots become subject to the rights settled by the arbitrator and any persons continuing to occupy any plot (Land) which he is not entitled to occupy under the final scheme is liable to be summarily evicted by the local authority. Consequently any change in the name of the holder of a final plot would affect the lawful title to such plot and it is difficult to hold that such change would not be substantial but merely involve correction of an error, irregularity or informality within the meaning of sec. 45B of the B'bay Town Planning Act, 1915 . Since no rights of the public are involved and the alleged error is at least partly due to the inaction or negligence of the applicant to take the necessary steps at the proper time before the T. P. Scheme was made final , it would be advisable to leave the party to seek its own remedies at law either by a declaratory suit or otherwise by negotiation with the party prima facei entitled under the final scheme. If the applicant's right to the final plot inquestion is established in a Court of Law or otherwise conceded by the prima facie holder, the requisite change could be made inthe property register and it would not be necessary to vary the final scheme as in force, It will not be advisable to effect what in fact amounts to a mutation of title by a so called variation of the final scheme permitted under sec. 45 B.

U.S. to C.D. No. 159/1 dt. 20/2/42.

Id/ D.M.S. 6/2/42

A.E.A. Id/. P.M.M. 19/2

Office of the B.L.A.

Paragraph 3 of the Final Town Planing Scheme Poona No. II provides that "3" cast iron pipe lines shall be laid on the roads as shown in blue lines on plan No. 6 and described in Schedule "B". The Chief Officer, Poona City Municipality reports that owing to the war cast iron pipes are not available in the market and therefore propses to use Hume pipes class C instead. The Consulting Surveyor to Government states that since the pipes are not available owing to vis major and the change is not voluntary on the part of the Municipality he is to see to authorise the Municipality to make the change and subsequenlty to apply to Government to vary the scheme The G.D. holds that the variation relates to a matter specified in clause (g) of section 3 and as it appears to be a substantial variation it can be given effect to only by following the procedure laid down in section 45-B of the Act. The Remembrancer of Legal Affairs is requested to advise.

2 Under clause (e) of section 11 of the Bombay Town Planning Act, 1915 read with section 3(g) of the said Act a Town Planning Scheme providing inter alia for water supply must contain a full desrciption of all details of the water supply scheme. The Town Plan ing Scheme, Poona No.II(final) gives the requisite details in paragraph 3, plan 6 and Schedule B. The provision for cast iron pipes a matter of detail and the change in respect of it would it appears be substantial. The cost of laying Hume pipes may quite conceivabley not be the same as that of "3" pipe and the estimate of costs provided in Schedule B is in the circumstances likely to vary. Under section 11(d) a Town Plan ing Scheme must contain an estimate of the net cost scheme to be borne by the local authority. Such estima is therefore a statutory necessity- The durability of

respective pipes may also be different and consequenlty any chnage in the specification of pipes woule be a substantial variatio n The proposed variation not having arisen on account of any error , irregularity or informality, section 45-B would it appears, have no application.(See T.L.A.'s No. 4641 dated 26-4-39). Since the Town Planning Scheme has been finally sanctioned and is already in force. it has effect as if it were enacted in the Lombay Town Planning Act, 1915. (Section 40(3)) Consequenlty it can only be varied by a subsequent scheme under section 46. As the proposed vari ation is likely to alter the estimate of costs and thereby affect the rights of the local authority under the final scheme it would, it appears, be necessary to have recourse to section 46 (See T.L.A.'s No. 502, dated 26-1-33). Non -availability of the pipes due to war conditions will not be an adequate ground or defence for making the proposed variation without following the procedure as laid down in the Act.

Id./P.W.M. 24/2

Remembrancer of Legal Affairs.

U.R. to the G.D.1747 dated the 25th February 1942.

Office of the B.L.A.

The question for the consideration of the B.L.A. is wheth er the holder of a final plot or plots who is liable to pay incremental contributions under the Town Planning Scheme but has not so far paid, is liable to pay interest on contributi ons, if he-

(a) now pays the whole sum in one instalment directly;-

(b) pays the whole sum due on individual plots in one instalment after undertaking to pay it in instalments ; or

(c) pays partly in instalments and the balance in one instalement without undertaking to pay in instalments.

Reading provisions of sections 28 and 40 of the Bombay Town Planning Act, 1915 together it will be clear that when the final scheme is sanctioned, the contributions levied on each plot become liabilities payable by the holder thereof with effect from the date on which the final scheme comes into force. There upon it would be open to the local authority to call upon each plot holder either to pay the net amount payable by him under the Act in one sum witin a specified reasonable period or in such instalements including charges for interest as shall be fixed under sections 26(1) ~~and~~ On a notice being served for the purpose the plot holder may (1) pay the whole amount payable in one sum within the period allowed, (2) agree to pay in instalments with interest or (3) fail to do either. In respect of case (1) no interest can be chargd at all. In respect of case (3) steps for recovery of arrears will have to be taken under section 28; but no interest can be charged on the arrears, for under the common la no interest can be awarded as damages for the mere wrongful detenti of money. (See Asoka C.Dutt's Law of Contract page 486). In res pect of case (2) the interest agreed to be paid would be recoverab under the agreement irrespective of whether payments are made strict according to the instalments agreed upon or whether two or more such instalments are paid before their due dates. The rights of the parties in this type of case would depend upon the terms or stipul ons in their mutual agreement.

Consequently the reply to the question raised will be as follows;-

In the case of (a) the plot holder cannot be charged interest unless he has agreed to pay in instalments with interest and then only under the terms of the agreement.

In the case of (b) the holder will be liable to pay interest at the rate fixed under the agreement.

In the case of (c) he will not, in the absence of any agreement to pay in instalements with interest, be liable to pay any interest ; but if there is an agreement to pay in instalements with interest, he will be liable to pay the interest that may be recoverable under the agreement.

Id./ P.N.M. 16 /3

Remembrancer of Legal Affairs.

U.R. to G.D. No. 2442. dated the 19th March 1942.

Consequently the reply to the question raised will be as follows;-

In the case of (a) the plot holder cannot be charged interest unless he has agreed to pay in instalments with interest and then only under the terms of the agreement.

In the case of (b) the holder will be liable to pay interest at the rate fixed under the agreement.

In the case of (c) he will not, in the absence of any agreement to pay in instalements with interest, be liable to pay any interest ; but if there is an agreement to pay in instalements with interest, he will be liable to pay the interest that may be recoverable under the agreement.

Id./ P.N.M. 16 /3

Remembrancer of Legal Affairs.

U.R. to G.D. No. 2442. dated the 19th March 1942.

Office of the R.L.A.

It appears from the report of the Consulting Surveyor to Governement at page 115 ante that the original boundaries of some final plots remained unchanged in the re onstituted plots, but the area of these plots as mentioned in the draft scheme were not correct and consequenty it was a case merely of correcting the areas and not of changng any boundaries. He thinks therefore that the proposal for certain changes in the Form A in the Final Scheme from page 73 to page 101 ante would be of an informal nature and requests Government to modify the final scheme accordingly under section 40(1) of the Bombay Town Planning Act.

Sub-sectins (a) and (c) of section 11 of the Town Plann ing Act, 1915 inter alia provide that the draft scheme shall contain (a) the area ownership and tenure of each original plot and (b) the extent to which it is proposed to alter the boundaries of original plots. Section 12(1) requires that in the draft schem the size and shape of every reconstituted plot shall be so determined as to render it, ~~so far as may be~~ So far as may be, suitable for building purposes. Rule 7(iii) of the Rules made by Government under the Bombay Town Planning Act provides that a draft scheme shall contain in addition to the particulars specified in clauses (a) to (e) of section 11 a plan on a scale not smaller than 80 feet to the inch showing both the original plots and the manner in which it is propsed to alter th boundaries of the original plots. If these provisions are read together it will be clear that the area and the size of each original plot as well as of the corresponding reconst tuted plot can be ascertained from the draft scheme and the map accompanying it. Under section 30(1) it is the duty of the arbitrator to define and demarcate the reconstituted plots. His decision under clauses (1) of section 30 is made final and conclusive and binding on all persons by section 31.

It is true that if in fact there be no change in the

identity of the plots a mere misdescription in one particu
lar such as the area specified would not affect or modify the
rights of the parties and there would be no serious objection
to rectifying any such mistake or error in the description
of the relevant plots. It has been laid down that when
the description is made up of more parts than one and one part is
true but the other part them false, then if the part which is
true describes the subject with sufficient legal certainty
the untrue one will have to be rejected (See Maharudrapa v. Lak
shman 34 B.L.R.212). Consequently if as reported by the Cons
ulting Surveyor, there is infact no change in the boundries and
therefor also in the idenltity of the reconstituted plots, the
areas as originally stated in the scheme could be treated as inco
rrect and the boundaires of the final plots as specified therein
could be taken as the correct description of these plots and the co
rrection of the areas could in that event be treated as one of an
informal nature. In the present instance, however, it appears that
the final scheme is already submitted to Government and the reconst
ituted plots have been valued and the increments thereon estimated on
the basis of the areas as stated in the draft scheme and the decision of
the Tribunal of Arbitration in respect thereof has already become final
conclusive and binding on all persons (See section 37(2) of the Act)
In his letter at p. 139 the Consulting Surveyor observes;-

"The decision of the Arbitrator and the Tribunal of Arbitration
under sections 31 and 37(2) were taken in the form of rates per square
yard and not clacualtion or resulant amounts. The proposals submitted by
the Arbitrator to the Tribunal for their decision were also as is always the
case in the form of varying rates per unit i.e. per square yard and the
Tribunal too gave their decision on the basis These decisions will not in
any way be affected by the changes in areas which are considered to be a
atter of detail and of fact". But when the areas and the rates are determined
the total contribution which each plot holder would be liable to pay would
be a matter of mere calculation and is as good as having also been determined

finally under section 37(2). Consequently the fact that only the rates per square yard are determined by the the Tribunal of Arbitration could not be enough to solve the difficulty. The Consulting Surveyor presumes that the owners will prefer to have correct areas shown for the plots and therefore the changes in calculations of contributions which are rightly stated to be consequential are bound to be accepted. It is very difficult to act on such a presumption particularly in cases where the areas may be reduced and the values of the plots thereby diminished. If however all the owners affected by such changes are willing to undertake the consequential liability i.e. to pay the contribution calculated on the basis of the correct area of each plot as now discovered, there may be no practical objection to treating the variations informal and to modifying the scheme under section 40(1) before finally sanctioning it; no such variation would however be strictly warranted by law.

From the legal point of view, owing to the effect of the provisions of section 31 and section 37(2) of the Town Planning Act, 1915, it will be more advisable to vary the scheme than to make the requisite changes in areas now, treating such changes as mere errors or irregularities. Determination of areas with reference to actual boundaries after the scheme is made final in spite of misdescriptions as to the areas of the reconstituted plots, will not affect the amounts of contributions recoverable in respect of these plots under the scheme. To change these areas at this stage would, on the other hand, affect such contributions and it is likely that the aggrieved parties may challenge the legality of introducing the changes without going through the procedure for varying the scheme.

Id/ P.N.B. 16/3

O.-. Remembrancer of Legal Affairs,

U.O. to G. L. No. 2375, dated the 17th March 1942.

Office of the R.L.A.

The question raised for consideration of the Remembracner of Legal Affairs is whether the land in final plot No. 131 in the Amalner Town Planning Scheme allotted under the scheme for the purpose of a post office can be used for any other purpose without varying the scheme. The answer to the queston is in the negative.

2 Section 172(1) of the Government of India Act,,1935, provides, inter alia, for the vesting of lands in the Provincial Governement and in the Central Gvernment. Clause(a) of the section specifies the lands which vest in the Provincial Gover nment. Thsi clause provides inter alia that all lands which immediately before the commecement of partIII of the Act were veste in His Majesty for the purposes of the Government of India shall as from that date if they are situate in a Provi ce vest in His Majesty for the purposes of the Government of that Province unless (i) they were then used for purposes which there after will be purposes of the Federal Government of (ii) they are lands formerly used for such purposes or intended or formerly intended to be so used and are certified by the Governor General inCouncil tohave bee retained temporarily for the purpo -se of more advantageous disposal by sale or otherwise. Clause (b) of the section specifies the lands which vest in the Central Government. Under this clause, the lands which immedia tely before the commencement of Part III of the Act vested in His Majesty for the purposes of the Governement of India and are situated in a Province but do not by virtue of clause (a) vest in His Majesty for the purposes of the government of the Province vest in His Majesty for the purposes of the government of the Federation . The land in this case was intended to be used for the purposes of a Post Office. It appears that from the letter of the Post Master General at p. 95 ante that the land iscertified by the Governor-General in Council to have been retained temporarily for the purposes of more a-

advantageous disposal by sale or otherwise. The effect of such a certificate read with the provisions of clauses (a) and (b) of section 172 (1) of the Act is merely to vest the land in the Central Government. As the land vests in the Central Governemtn, it is open to it to sell the same to any one it likes. The above provisions, however do not empower the Central Government or a purchaser ~~however do not e~~ of the land from the said Government to use the land for any purpose contrary to the provisi ons of the town planning scheme. The Bombay Town Planning Act, 1915 appli s as much to lands vesting in the Centre as to those vesting in the Province. Under section 40(3) of this Act a town planning scheme has effct as if it were enacted in the Act. The land, therefore, in this case is subject to all the provisions of the scheme and can be used only for the purpose for which it is allotted. There is noting in clause (a) or (b) of section 172 of the Govern ment of India Act which has the effect of overriding the sta tutory obligations imposed under the Bombay To n Planning Act in respect of any land vesting in the Central Government. The view taken by Joint Secretary, General Department, that the land in this case cannotbe used for any purpose other than that for which it was allotted under the town planning scheme unless the scheme is varied is correct-

O.C. Id./ P.N.M. 27/2

Remembrancer of Legal Affairs.

J.R. to G.D., No. 2798, dated the 28th March 1942.

Office of the [illegible]

If it were merely a question of correcting the areas of the final Plots in conformity with their boundaries shown in the plan, it would have been treated as an informality within the meaning of section 40 of the Bombay Town Planning Act, 1915. The correction of areas would, however, involve consequential changes in the increments already fixed in respect of the plots. Consequently it is not a case of one error being corrected but a series of errors involving considerable modification of the contributions recoverable in respect of a number of plots. It was on account of this reason that the A.L.A. advised in his last opinion that the variation of the scheme would not be strictly legal and he adhered to that opinion.

Id./ P.T.O. 11/6

O.C. Remembrancer of Legal Affairs.

U.O. to G.D. No. 4827 dated the 11th June 1942.

Office of the R.L.A.

It appears that there is no mistake in the original scheme sanctioned by Government, but the mistake has crept in only in the printed copies of the schere. There can be no legal objection to correcting such a mistake in the printed copies by issuing an erratum.

Id/ P.N.M. 13/6

O.C. Remembrancer of Legal Affairs.

U.R. to G.D., No. 4201, dated the 15th June 1942.